IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

DAVID HERBERT and DIANA HERBERT, husband and wife, and the marital community thereof, Appellants, v. CITY OF EVERETT, WASHINGTON, a Washington municipality, Respondent.	)	NO. 56629-6-I UNPUBLISHED OPINION FILED: AUGUST 21, 2006

BECKER, J. -- The Everett home owned by David Herbert suffered damage from surface water flooding on two occasions. Herbert attributed the flooding to lack of capacity in the drainage system built years ago by the private developer of the plat. Herbert brought negligence and trespass claims against the City of Everett, but failed to show that the City's involvement with the drainage system gave rise to anything other than a public duty. The trial court properly dismissed Herbert's claims on summary judgment.

We review an order of summary judgment dismissal de novo. Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). We must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

FACTS

Considered in the light most favorable to Herbert, the relevant facts begin in 1967 with the development of the Valley View plat in the southeast corner of the City of Everett in an area known as Panaview. Larlyn Development Company, a private developer, developed the plat using the services of John Friel, an engineer for the firm of Ruskin Fisher. The project consisted of building streets, a sanitary sewer, and a storm water drainage system. Upon completion of the project in the fall of 1968, the City accepted the plat for continuous maintenance.

Surface water entered the plat's storm water drainage system through curbside drains, called catch basin grates. From the grates, the water ran down through a series of underground pipes toward the southeast corner of the plat. These eventually connected to two pipes, and these in turn converged into a single pipe beneath a grate in a cul de sac along Panaview Boulevard. The

single pipe conducted the water down into an outfall in a ravine.

Located near the cul de sac where the two drainage pipes met is Herbert's home on Panaview Boulevard. Herbert bought the home in September 2002. The cul de sac flooded four times between June 2003 and August 2004. Each time, water backed up from the storm drain and flowed down his driveway. On two occasions, the flood entered the Herbert home, causing damage. Herbert's home was the only one on the block that was flooded. Herbert's insurance company refused to cover the flood damage because the water entered from outside the home.

Herbert sued the City for negligence and trespass in April 2004. The court granted the City's motion to dismiss all claims on summary judgment. Herbert appeals.

As a general rule, landowners may dispose of unwanted surface water – a common enemy – in any way they see fit, without liability for resulting damage to one's neighbor. Because a strict application of the common enemy doctrine is widely regarded as inequitable, several exceptions to the doctrine have been adopted over the years. Currens v. Sleek, 138 Wn.2d 858, 861-862, 983 P.2d 626 (1999). Herbert contends the City breached duties created by exceptions to the common enemy doctrine.

When claims for trespass and negligence arise from a single set of facts, and there is no allegation that the damage was caused intentionally, we treat

them as a single negligence claim alleging breach of duty. Pruitt v. Douglas County, 116 Wn. App. 547, 553-554, 66 P.3d 1111 (2003). Before a plaintiff may recover in negligence against a municipal government, the court must determine that the government owes a duty to the individual claimant. A duty owed to the general public will not suffice. Patterson v. Bellevue, 37 Wn. App. 535, 537, 681 P.2d 266 (1984) (affirming dismissal of claim that City interfered with natural flow of creek; no evidence City breached riparian duty owed to creek side residents by approving upstream development). This principle, also known as the public duty doctrine, shields a municipal government from liability for damage caused by an inadequate drainage system if the only action taken by a county or city is to approve a private development plan under existing regulations, or to accept ownership of the completed system in order to guarantee perpetual maintenance. Phillips v. King County, 136 Wn.2d 946, 963-965, 968 P.2d 871 (1998).

In negligence terms, approval of a private development under existing regulations involves duties owed to the public at large, but not to a specific landowner. The public duty doctrine "militates against finding municipal liability based only on approval of private development." Phillips, 136 Wn.2d at 963. In a declaration submitted by the City in support of its motion for summary judgment, Friel—the engineer who designed the drainage system for the private developer—testified that he "made every significant decision with regard to the

design" of the plat. He said that city engineer Rodney Colvin "did not make any of the design decisions with regard to the Valley View Plat or designate where pipes should be placed. The City had the permitting authority with regard to this project and nothing more."

Herbert contends, however, that the City went beyond mere permitting and approval by becoming actively involved in the design of the plat's drainage system. According to Herbert, documents from the 1967 era prove that Colvin specified and approved the design of the drainage system, while Friel simply followed Colvin's specifications.

The record shows that in September,1967, Colvin made recommendations to the Planning Commission regarding the plat on behalf of the City's Engineering Department. He wrote that the plat, in accord with relevant ordinances, would be drained by "drain lines in the streets carrying the water to the southeast corner of the Plat, and thence into Wood Creek." Later, he wrote to Ruskin Fisher that the planning commission had given "tentative approval" for the proposed plat, subject to "a written statement from you with regard to which method you propose to use in carrying out the improvements as set forth in Section 7D of City of Everett Ordinance No. 4157, 'Minimum Standards for installing improvements.'" According to Colvin, the "minimum standards" for drainage were as follows:

> The street drainage in the plat must be carried to the southeast corner of the plat by a drainage system of catch basins and drain lines. This

> drainage system must be approved by the City Engineer as to location and pipe sizes. The drainage will flow from the plat to Wood Creek, and it will be the responsibility of the developer to acquire any necessary easements and to do what may be necessary to prevent erosion.

A series of designs of the drainage system drawn by Friel in 1967 bear the stamp, "Approved by Rodney V. Colvin, City of Everett Engineer." In October 1968, Colvin wrote to Larlyn on behalf of the City, accepting the plat, including the drainage system, for continuous maintenance.

Nothing in these documents is sufficient to prove the City's active involvement in the design of the plat project. The only reasonable inference that can be drawn from the record is that the City permitted and approved the private developer's drainage system, as designed by Friel, and then accepted the completed project for maintenance. Under Phillips, a city does not become liable in negligence for these activities. The duties involved are not owed to specific landowners.

Herbert contends that even if the City's involvement in the initial development was not sufficient to incur liability, the City has had enough time in the ensuing decades to evaluate the drainage system and correct its deficiencies. He contends Phillips should be narrowly construed so as to ensure that homeowners are not left without a remedy after the disappearance of the private developer from the scene. We reject this argument. Phillips is emphatic on this point: "If the county or city were liable for the negligence of a private

developer, based on approval under existing regulations, then the municipalities, and ultimately the taxpayers, would become the guarantors or insurers for the actions of private developers whose development damages neighboring properties." Phillips, 136 Wn.2d at 961.

Phillips, however, does recognize that a municipality may become liable for surface water damage when it acts as a direct participant in allowing a developer to use land over which the municipality has control. In Phillips, the county had permitted the developer to install water-spreading devices on a right-of-way owned by the county. The court allowed the plaintiffs to pursue the County on a theory that the water spreaders caused flooding. "By making public property available for the building of the drainage facilities, the County may share in any potential liability, along with the developer, for damage to the Phillips' property caused by the dispersal of water from the spreaders." Phillips, 136 Wn.2d at 969.

Herbert contends his situation is analogous to this aspect of Phillips, if not factually identical. He alleges that after the City of Everett accepted the Valley View plat, the City assisted other developers by letting them drain new impervious surfaces into the already overburdened Valley View system. Assuming these allegations to be true (and insisting the evidence is scant), the City argues that they do not give rise to a duty owed to Herbert because the permitting function involves only a public duty. We need not resolve this issue

because we conclude that even if a City can become liable by allowing new runoff to enter a system known to be already at capacity, Herbert has not provided sufficient evidence of such post-1968 activities by the City to establish such liability under one of the exceptions to the common enemy doctrine.

Under the channel and discharge exception to the common enemy doctrine, a landowner is liable for artificially collecting and discharging surface waters upon adjoining lands in quantities greater than or in a manner different from the natural flow. Currens, 138 Wn.2d at 862. To establish the channel and discharge exception, the finder of fact must compare the amount of surface water that would naturally reach the appellant's property with the amount that reaches the property after the development. Ripley v. Grays Harbor County, 107 Wn. App. 575, 582, 27 P.3d 1197 (2001). In a declaration offered in support of Herbert, Engineer Greg Diener opined that the flood waters that entered the Herbert property "clearly exceeded the natural surface runoff to their property and were discharged from the City's storm water system." But he cited no measurements to support this opinion. In the context of a summary judgment motion, an expert must support his options with specific facts. A court will disregard expert opinions where the factual basis for the opinion is found to be inadequate. Rothweiler v. Clark County, 108 Wn. App. 91, 101, 29 P.3d 758 (2001); Price v. Seattle, 106 Wn. App. 647, 656-58, 24 P.3d 1098 (2001).

Herbert also relies on an environmental checklist prepared by the City in

2004 in connection with plans to improve the Panaview Boulevard drainage system. The checklist explains that repeated flooding has demonstrated that larger pipes are necessary. The checklist also mentions that surface water runoff in the system has increased: "since the original installation in the late 1960's subsequent upstream developments have caused increased impervious surfaces resulting in increased flows and decreased time of concentration." Even if this brief comment could be viewed as evidence of additional and quantifiable runoff coming into the Valley View stormwater system, it does not describe the location of the "subsequent upstream developments", and it does not prove that the City of Everett was responsible for authorizing them. Similarly, evidence that 17 new homes were built in the drainage basis after 1968 does not quantify an increase in runoff in excess of the natural flow.

We conclude no factual basis exists to support an inference that the City actively participated in expanding quantities of stormwater running off into the Valley View drainage system after the plat was accepted for maintenance.

Herbert also invokes the due care exception to the common enemy doctrine. A landowner who alters the flow of surface water on his or her property must exercise due care by acting in good faith and by avoiding unnecessary damage to the property of others. Currens, 138 Wn.2d at 862. Herbert argues that the damage to his property was unnecessary and the City could have easily avoided it by improving the system. The due care exception, however, applies

only where the defendant has done something to alter the flow of surface water. Rothweiler, 108 Wn. App. at 103.

To establish that the City altered the natural flow, Herbert refers to the deposition of Diener. The City pressed Diener to admit that even if all the manmade structures were taken off the hill, the natural flow of water would still be downhill toward the cul de sac where the Herbert home is now located. Diener acknowledged that some of the drainage would indeed have followed that course, but also indicated that he thought some of the drainage would have gone a different way. Without quantification this opinion is highly conclusory and of little use. And even if it were enough to establish that the flow of surface water has changed from its natural state, the record lacks evidence of anything the City did to bring the change about.

Phillips acknowledges that a municipality may become liable for lack of due care in maintenance. Phillips, 136 Wn.2d at 966. Herbert argues that the City's maintenance plan was inadequate, but he cites only to Diener's deposition testimony citing the presence of silt discharged from the system as a "possible" contributing factor to the inability of the system to convey away all the stormwater in 2003 and 2004. An opinion stated only in terms of possibility is too speculative to create an issue of material fact. See Griswold v. Kilpatrick, 107 Wn. App. 757, 761-762, 27 P.3d 246 (2001).

We conclude that the public duty doctrine bars Herbert's claims insofar as

they are based on the City's involvement in the initial development of the drainage system, because the City did no more than permit the system under existing law and accept it for maintenance. As to the City's alleged liability for acts or omissions in the intervening years, Herbert has failed to establish that the City did anything to channel or discharge surface water onto his property in quantities greater or in a manner different from the natural flow.

Affirmed.

Becker, J.

WE CONCUR:

Schindler, ACJ Coleman, J.